No. 08-1288

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

PATRICK J. BERGIN,

Petitioner,

v.

SUSAN MCCALL, NORMAN REYNOLDS, KATHLEEN HALEY, PHILIP PARSHLEY, DAVID R. GRUBE, CLIFFORD R. DEVENEY, DAVID G. WATT, LISA A. CORNELIUS, RAMIRO GAITAN, NATHALIE M. JOHNSON, DOUGLAS B. KIRKPATRICK, GARY J. LECLAIR, PATRICIA L. SMITH, JOHN C. STIGER, SHERIDAN A. THERINGER, JUDITH L. RICE, FRANK J. SPOKAS, JOSEPH L. THALER, SURESHT R. BALD, MARCIA G. DARM, LISA G. DODSON, and JAMES D. SCOTT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent NORMAN REYNOLDS, M.D., respectfully requests that this Court deny Petitioner PATRICK BERGIN's Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner PATRICK BERGIN, M.D., filed his "Complaint for Damages, Restitution, and Injunctive Relief" on December 7, 2006, alleging that twenty-three individual defendants violated his constitutional rights during the course of administrative proceedings conducted against his licensure by the Oregon Board of Medical Examiners (hereinafter "BME"). Dr. BERGIN, a cardiologist, was investigated, had his license suspended and, eventually, revoked. The BME's actions were predicated on evidence that BERGIN's professional acumen was jeopardized by his use of alcohol and other substances.

Respondent NORMAN REYNOLDS, M.D., was retained by the BME to evaluate licensee/Petitioner BERGIN. On November 27, 2002, Dr. REYNOLDS recommended that plaintiff enter and complete a "twelve-step" program. The Petitioner initially enrolled in, but declined to successfully complete, such a program. He also declined to participate in monitoring. Petitioner posited that all "twelve-step" programs rely upon "religious indoctrination" – requiring Dr. BERGIN to accept, observe, and/or practice religion under state edict. Dr. BERGIN also alleged that the underlying

diagnosis of his substance abuse or dependency was "false."

Petitioner alleged nine causes of action, "under 42 U.S.C. § 1985(3)."

Petitioner's theory of liability was factually and procedurally flawed. First, the BME's final order did not require Petitioner's participation in a twelve-step program of any nature, let alone one of the subset of programs premised upon "surrender" of self will to a higher power. (Final Order of Board of Medical Examiners, page 18, referenced in the District Court's decision, page 25a, Appendix to Petition.)

The second flaw in Petitioner's attempts to pursue an action in the federal court is that Petitioner declined to invoke state judicial review. (See District Court decision, page 26a, Petitioner's appendix.)

PROCEDURAL POSTURE

Respondent REYNOLDS filed a motion to dismiss the action pursuant to Rule 12(b)(6). Two separate grounds were asserted. First, that Dr. BERGIN had allowed the statute of limitations for pursuing a 42 U.S.C. § 1983 action to run. Second, Dr. REYNOLDS' only role was that of an expert consultant. He was, as a consequence, immune from liability for the theories advanced in Petitioner's complaint. The District Court, however, primarily dismissed Petitioner's action on the grounds that the BME's final

administrative adjudication was entitled to preclusive effect under the law of the state in which the resolution occurred.

Petitioner appealed to the Ninth Circuit Court of Appeals. In a simple, three court decision, the Court of Appeals affirmed:

> The district court properly granted summary judgment because BERGIN's claims were precluded by the Board's order suspending BERGIN's medical license. *See id.* at 1037 n.7 ("[We will give preclusive effect to the legal as well as the factual decisions of [state] administrative tribunals, if the courts of the state would do so and if the minimum requirements of [*United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)] are met."); *id.* at 1033 ("The fairness requirements of *Utah Construction* are: (1) that the administrative agency act in a judicial capacity, (2) that the agency resolve disputed issues of fact properly before it, and (3) that the parties have an adequate opportunity to litigate."); *Chavez v. Boise Cascade Corp.*, 772 P.2d 409, 410 (Or. 1989) ("[A] valid and final administrative adjudication has the same preclusive effects as a court's judgment.").

(See Petition, Appendix page 2a.)

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Uncontradicted Record Confirms That Petitioner Was Never Required to Undergo Religious Indoctrination.

Petitioner contends that, as a condition for retaining his professional licensure as a physician and surgeon, the state licensing agency required him to participate in a twelve-step program designed to address substance abuse. Traditionally, one of the twelve steps encourages program participants to resign themselves to a higher authority. Accordingly, Petitioner theorizes that he was the victim of state-sponsored imposition of religious doctrine, in a scope having constitutional consequences. However, the entire premise for liability, and certainly invocation of federal jurisdiction, was based upon a demonstrably false premise. The Final Order of the State of Oregon's Board of Medical Examiners did not require Petitioner to participate in a twelve-step program. (See Final Order, page 18, referenced in District Court Order, Petition for Writ of Certiorari, Appendix, page 25a.)

2. Neither Decision Below, Nor the Record, Raises the First Question Presented in the Petition.

Petitioner raises two questions. First, "whether coerced participation in a twelve-step based evaluation process violates the Establishment Clause, the

Free Exercise Clause, and the First Amendment." (Petition, page i.) However, neither the U.S. District Court for the District of Oregon, nor the Ninth Circuit Court of Appeals, decided such an issue.

Accordingly, this case is missing an essential factual predicate of the first question presented: the courts below did not rule on whether or not a state administrative agency can require a licensee to participate in a twelve-step substance abuse program as a condition of ongoing licensure. Moreover, there would have been no reason to address such a question, since participation in a twelve-step program ultimately was not imposed upon Petitioner as a condition of licensure. The *in propria persona* Petitioner would have this Court rule on a hypothetical situation that was not before the Courts below.

3. Petitioner's Second "Question Presented" Does Not Invoke Any Criteria Warranting Review by the United States Supreme Court.

Petitioner additionally queries "[W]hether a state administrative hearing has preclusive effect over Constitutional Claims in Federal Court." (See Petition, page i.)

As a threshold consideration, Petitioner should be estopped from raising such a question, as he rejected a full and fair opportunity to have his grievance adjudicated through judicial review in the state courts. Petitioner had a statutory right to raise his

constitutional claims before the Oregon Court of Appeals. (Oregon Revised Statute § 183.482(8)(b)(C) (The court shall remand to the agency if it finds that the agency's exercise of discretion was in violation of a constitutional or statutory provision). While Petitioner could have challenged the propriety of the administrative proceedings undertaken against his licensure in the Oregon State system, he simply declined to initiate judicial review.

It is respectfully submitted that Petitioner's failure to invoke – let alone exhaust – the judicial remedies available to adjudicate his hypothetical constitutional authority estopped him from forum shopping his case to the U.S. District Court. Moreover, it was appropriate for the District Court to enforce the preclusive effect given to an essential finding of an administrative agency since Petitioner had a full and fair opportunity to be heard, and to subject the administrative decision to scrutiny by the Oregon legal system, through judicial review. (*Stanich v. Precision Body and Paint, Inc.*, 151 Or. App. 446, 455 (1997).) Federal courts will give "preclusive effect to the legal as well as the factual decisions of [state] administrative tribunals, if the courts of the state would do so and if the minimum requirements of [*United States v. Utah Construction and Mining Company*, 384 U.S. 394, 422 (1966)] are met." Once it is shown that the administrative agency has acted in a judicial capacity, that the agency resolve disputed issues of fact properly before it, and that the parties had an adequate opportunity to

litigate, a valid and final administrative adjudication has the same preclusive effect as a court's judgment. (*Chavez v. Boise Cascade Corp.*, 772 P.2d 409, 410 (Or. 1989).)

The petition fails to identify any controversy concerning the restraint exercised by federal courts respecting full final and procedurally fair adjudications conducted in the state court system. Petitioner identifies no conflict between the decisions of any court of appeals. The foregoing principals do not constitute an important and recurring conflict of any type. Certainly, Petitioner has not identified a conflict between the decisions of any courts of appeals and decisional authority issued by the United States Supreme Court.

Petitioner's second issue does not constitute an important legal *problem* that is intrinsically important, requiring resolution. (*Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955).) Indeed, the foregoing doctrine of restrained federal intervention into final decisions rendered in state tribunals is sound and appropriate.

The Petitioner's second, procedural issue certainly does not give rise to an important constitutional issue. Indeed, the widely accepted, uncontroversial exercise of interventional restraint by the federal courts – particularly appropriate in this matter since the Petitioner has unilaterally declined to invoke statutorily-guaranteed judicial review presented under Oregon law – would unduly and, arguably, unconstitutionally, intrude on the authority retained by

states. There is no obvious issue of constitutional importance raised in the petition (*Gonzales v. Raich,* 545 U.S. 1, 14 (2005); *United States v. Booker,* 543 U.S. 220, 226 (2005).)

Petitioner has not identified any similar issues already pending before the Supreme Court.

Petitioner has failed to demonstrate that the lower courts' decisions are erroneous. Even if he made such a showing, this Court does not typically exercise jurisdiction for the simple purpose of correcting errors committed by the lower court. The U.S. Supreme Court is not a tribunal of errors and appeals. (*Ross v. Moffitt,* 417 U.S. 600, 616-617 (1974).)

CONCLUSION

Petitioner premises his application with a theoretical event which is controverted by the very record appended to the petition. Specifically, Petitioner falsely represents that he was required to participate in a twelve-step program for alleged substance abuse as a condition of his ongoing licensure. In fact, the U.S. District Court *found* that no such condition was imposed upon Petitioner in the final order issued by the BME.

Petitioner unilaterally declined to invoke statutorily-guaranteed judicial review available to him under Oregon law. He should be estopped from tardily forum – shopping for his challenge of an administrative

decision which he permitted to become final, without exercising his further rights of review under state law. The District Court, and, subsequently, the Ninth Circuit Court of Appeals' acknowledgment of the preclusive effect of an administrative ruling, after Petitioner's full and fair opportunity and incentive to be heard on the issue, was entirely appropriate.

The petition fails to identify any appropriate criteria warranting issuance of a writ of certiorari. The petition should be denied.

Respectfully submitted,

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